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IN THE
Supreme Court of the United States

October Term, 1979

No. 79-261

LEROY BARNES, STEVEN BAKER, JOSEPH HAYDEN, JOHN
HATCHER, WAYMIN HINES, JAMES MCCOY, WALLACE FISHER,
WALTER CENTENO, LEON JOHNSON, STEVEN MONSANTO and
LEONARD ROLLOCK,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY MEMORANDUM

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REPLY MEMORANDUM

Petitioners Leroy Barnes, Steven Baker, Joseph Hayden, John Hatcher, Waymin Hines, James McCoy, Wallace Fisher, Walter Centeno, Leon Johnson, Steven Monsanto and Leonard Rollock respectfully submit the instant Memorandum in reply to the Brief for the United States, pursuant to Rule 24(4) of the Rules of the Supreme Court, in order to address arguments first raised in the Government's brief in opposition.

1. With regard to the conduct of the jury *voir dire* and the empaneling of an "anonymous" jury, the Government once again contends that the trial judge was justified in taking such stringent (and unprecedented) precautions in light of fears for the safety and security of the veniremen. It is noteworthy, however, that the trial judge explicitly *rejected* the very same assertions of "dangerousness" when they originally were proffered by the Government prior to trial and specifically disavowed dangerousness as his "real" motivation for imposing jury anonymity (Pet. App. 87a).*

Demonstrative of the fact that the trial judge explicitly rejected unfounded accusations of dangerousness as a rationale underlying his decision, steadfastly maintaining that his actions were motivated exclusively by his concern for insulating the jury from the "irresponsibility" of the press, is the following colloquy occurring during the actual jury *voir dire* on September 27, 1977:

The Court: If I may have your attention for a moment, I read this article provided to me by the generosity of Mr. Breitbart on page 11 of today, September 27, 1977, Post.

. . . I have a definite recollection that with respect to the pre-trial conference that we had . . . May 2nd when I announced there was going to be an adjournment, Mr. Sear [the prosecutor] made an impassioned plea for the benefit of the press and, in the course of that, indicated that witnesses might be approached, etc., etc.

* It bears reiteration, of course, that despite its belated attempts to justify the trial judge's actions, the Government never requested the empaneling of an anonymous jury, perfectly content that ordinary sequestration, without more, would be fully sufficient to preserve the integrity of the trial process as well as the security of the jurors. Moreover, as noted by Judge Meskill, in dissent, at the time of the trial judge's surprise announcement, the Government was "noticeably silent." (Pet. App. 87a).

It is in that connection that I made the comment which is the direct quote in this article that I will not have witnesses or families threatened.

The reporter obviously is transposing this to the present day and this is significant in my opinion, of the irresponsibility of the press and drawing from it certain inferences by reason of the fact that we do have marshals present as we normally do in cases of this type.

. . .

I think this is the kind of thing that I want to try and isolate the jury from because here is something that happened in May and they are putting it down as though it happened today and it just isn't so and you and I both know it. (Tr. 369-371).

Moreover, the trial judge specifically rejected the same allegations of petitioners' purported involvement in witness intimidation that the Government once again raises here (Gov. Br. 5, 9, 13). At the Government's insistence, the trial judge afforded a pretrial opportunity for it to make an evidentiary showing of petitioners' dangerousness as part of its application to remand petitioners with "high risk" designations prior to trial. See Rule 6(b), Southern District Speedy Trial Plan. The trial court, however, quickly denied the Government's application when it became readily apparent that it had not presented one iota of competent evidence even remotely linking petitioners to the incidents complained of. See pretrial transcript of September 15, 1977 at 31-216. Indeed, contrary to the Government's claim, it may well be said that the trial court implicitly made findings of *nondangerousness* on the part of petitioners.

Furthermore, the Government still has provided no justification for the wholly precipitous manner in which the trial judge imposed jury anonymity in this case—simply announcing his decision *sua sponte* on the eve of trial and

immediately silencing all attempts at colloquy on the subject.*

Nor has the Government cited any specific instance where the trial court considered any less drastic alternatives, such as *in camera* revelation of jurors' identities to counsel, or where the court made findings that ordinary sequestration, without more, was an inadequate remedy under the totality of circumstances presented here. See, e.g., *United States v. Gurney*, 558 F.2d 1202, 1210 n. 12 (5th Cir. 1977).

Rather, the trial court broke with literally 200 years of precedent in the conduct of American criminal trials and did so in a situation in which it refused to explore, or even consider, any less drastic means before resorting to the unprecedented actions taken herein. As noted by Judge Oakes, in dissent, notorious criminals as disparate as Al Capone, Lucky Luciano, "Lepke" Buchalter, Frank Costello and the Apalachin defendants all have been provided jury trials where confrontation with the identities of veniremen has been an accepted part of the constitutional norm (Pet. App. 105a). The Government has provided no basis whatever for distinguishing those situations from that faced by petitioners in the case at bar.** The trial

* The Government is simply incorrect in its assertion that 28 U.S.C. § 1863(b)(7) provides statutory support for withholding jurors' names and addresses *at trial*. (Gov. Br. 14 n. 11). Examination of the legislative history underlying the Jury Selection and Service Act of 1968 (28 U.S.C. § 1861 *et seq.*) demonstrates conclusively that its provisions, as well as the comparable provisions of the Southern District Jury Selection Plan, relate exclusively to the pretrial empaneling of jury panels, not to the *voir dire* of individual veniremen as part of the trial process (Pet. App. 95a-96a). Moreover, the Government has cited no decision by any court which supports its interpretation of the statute. Compare, Pet. at 10-11 n.*.

** Nor has the Government demonstrated any manner in which sequestration was an inadequate prophylactic precaution. Compare Pet. App. 105a.

court's unprecedented actions in this regard constitute fundamental error warranting reversal.

2. With regard to the disclosure process by which petitioners' tax returns were acquired for use in a non-tax criminal prosecution, the Government argues that no hearing on the disclosure process was necessary because the last sentence of 26 U.S.C. § 6103 (i) (4) states that the improper admission of returns was not reversible error. Both the Government and the Court of Appeals, however, misconstrue the import of that sentence, and a proper reading makes clear that it has no application to this situation.

The final sentence of § 6103 (i) (4) reads:

"The admission into evidence of any return or return information contrary to the provisions of this paragraph shall not, as such, constitute reversible error upon appeal of a judgment in such proceeding."

This sentence does *not* mean that the admission of tax returns can never be reversible error.* It means only that a return which is improperly admitted will not *automatically* require reversal. The drafters of the sentence gave the following example of its limited application:

"(D)isclosure (of returns) in a . . . trial . . . would not be allowed unless . . . such return is probative of the commission of the crime. Thus, a return . . . would not be admissible for purposes of 'collateral impeachment', i.e., discrediting a witness on matters not bearing upon the question of the guilt of the defendant.

. . .

* Such an interpretation would bring this sentence into direct conflict with the Due Process clause, 28 U.S.C. § 2111 and F.R.A.P. 52 (a)—all of which require reversal for non-harmless errors—and would raise serious doubts as to its constitutionality.

(W)hile the admission of the return in the proceeding would not constitute reversible error because it was admitted into evidence in violation of the provision, it nevertheless *may constitute reversible error on other grounds.*** Joint Committee On Taxation, General Explanation of the Tax Reform Act of 1976, H.R. 10612, 94th Cong., Pub. Law 94-455 at 325.** (emphasis added).

The last sentence of subsection (4), therefore, has no applicability to a violation of the disclosure provisions of subsection (1). Cf., *United States v. Mangan*, 575 F.2d 32, 39 n. 7 (2d Cir. 1978) (Friendly, J.). Accordingly, it does not provide any basis either for denying production of the information given the *ex parte* judge or for denying a hearing on the motion to suppress, and there must be a remand for both of these proceedings.***

* Such as, e.g., prejudice under FRE Rule 403 or violation of the privilege against self-incrimination.

** This quotation, with the penultimate word inadvertently omitted, may also be found in [1976] U.S. Code Cong. & Admin. News at 3759. See also, Comment, *The Need for Reform of the Informational and Evidentiary Use of Tax Returns in Non-Tax Criminal Prosecutions*, 14 Am. Crim. L. Rev. 163, 187-88 (1976).

*** Even assuming *arguendo* that this Court rules that the last sentence of subsection (4) does render immune from reversal a conviction based upon returns obtained in violation of subsection (1), there still must be a remand for a hearing to determine whether subsection (1) was complied with.

CONCLUSION

The petition for a writ of certiorari should be granted.

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Respectfully submitted,

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